

**UNITED STATES BANKRUPTCY COURT  
SOUTHERN DISTRICT OF FLORIDA**

In re:

CASE NO. 04-17383-BKC-AJC

EDGAR ALFONSO TOVAR,

Debtors.

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**ORDER GRANTING CREDITOR'S AND CHAPTER 13 TRUSTEE'S  
MOTION TO DISMISS FOR BAD FAITH FILING**

**THIS CAUSE** came before the Court for evidentiary hearing on the 16<sup>th</sup> day of December, 2004 at 2:30 p.m., upon Creditor Roger Silverio's Motion To Dismiss For Bad Faith Filing, filed on behalf of himself individually and as duly-appointed closing agent for Lifestyles Designs Enterprises, Inc. ("Creditor's Motion"), and the Chapter 13 Trustee's Motion To Dismiss ("Trustee's Motion"). At the hearing, two issues arose: (i) whether the Debtor was over the debt limit for Chapter 13 eligibility and (ii) whether the discrepancies in the original petition and schedules and amended schedules rise to the level of bad faith to justify dismissal of the case. The Court took the matter under advisement and requested post-hearing submissions and proposed orders from the parties.

Upon review of the parties' submissions, and having considered the exhibits and other evidence admitted, including the candor and demeanor of the witness, the Court believes this case should be dismissed based on the Debtor's omissions on his schedules. Accordingly, the Court need not address the issue of Debtor's eligibility.

**FACTUAL BACKGROUND**

The Debtor filed a petition for relief under Chapter 13 of the United States Bankruptcy Code on August 3, 2004, together with his schedules and statement of financial affairs. The only creditors

disclosed in the originally filed schedules are Mercedes Benz, having an indebtedness for one automobile in the amount of \$30,000.00; CitiAdvantage credit card for a debt of \$8,862.00; and, Roger Silverio, for the sum of \$250,000.00.

The Debtor subsequently amended his schedules on December 13, 2004. The amended schedules added *inter alia* the following assets to Schedule B:

1. Clothing valued at \$2,000.00;
2. Jewelry (i.e. Movado watch worth \$600.00; 2 wedding bands worth \$400.00; 2 pairs of cufflinks worth \$200.00; 2 gold chains with crucifixes worth \$600.00; and a bracelet worth \$150.00);
3. Several insurance policies (i.e. Florida Farm Bureau life insurance policy; West Coast Life Ins. Co. policy and New England Life Ins. Policy) all valued at \$0;
4. Additional cars (i.e. Mercedes Benz C240 (Green) worth \$25,000.00; Mercedes Benz C240 (Blue) worth \$25,000.00; 2000 Toyota Echo worth \$4,000.00)
5. Two firearms - Taurus .38 caliber revolver worth \$250.00 and a Barretta .32 caliber semi-automatic hand gun worth \$400.00; and,
6. Lifestyles Properties shares, an Asian parrot worth \$500.00 and a 2000 Mosquito Scooter worth \$500.00.

The Debtor further added to his Schedule "D", the creditor CitiMortgage, for the sum of \$367,985.94 in relation to the mortgage on his home, and to Schedule "F", debts to American Express for the sum of \$267.36; Amoco for the sum of \$40.00; Chevron for the sum of \$97.50; Citi Platinum Select for the sum of \$791.53; Home Depot for the sum of \$244.05; Target/Visa for the sum of \$272.24; and, Union Planters for a loan in the amount of \$50,000.00.

The Debtor testified at the hearing that he did not include in his Statement of Financial

Affairs income from work performed in Panama or his income from his employer, Fine Living (for whom he testified he has worked for the past two (2) years) for the year 2004. The Debtor's testimony further revealed he did not disclose his prior addresses for the two (2) year period pre-petition. More significantly, the Debtor failed to disclose in Paragraph 3 of the Statement of Financial Affairs any payments to creditors within the 90 day period prior to filing his bankruptcy, such as his mortgage and automobile payments.

The Debtor contends these omissions were not wilful or material and therefore do not rise to the level of bad faith to justify dismissal of this case. The Debtor admits that the amendments are significant, but he claims the omissions were not material misstatements intended to mislead the Court. For example, the Debtor asserts he forgot to list the additional vehicles because he did not drive them and there was no equity in them, and he did not initially list the credit card companies because he did not have outstanding balances on the accounts. Finally, the Debtor asserts he did not initially list all obligations in his schedules because his employer has regularly paid his monthly personal obligations, such as his home mortgage, automobile payments, credit card balances and the like, for the past few years.

### **CONCLUSIONS**

Section 1307(c) of the Bankruptcy Code provides that the Court may dismiss a Chapter 13 case for cause; and, lack of good faith in filing constitutes such cause. *See In re Buchanan*, 225 B.R. 672, 673 (Bankr. D.Minn. 1998) citing *In re Belden*, 144 B.R. 1010, 1019 n. 17 (Bankr. D.Minn. 1992). The Eleventh Circuit has stated that "whenever a chapter 13 petition appears to be tainted with a questionable purpose, it is incumbent upon the bankruptcy courts to examine and question the debtor's motives." *In re Waldron*, 785 F.2d 936, 941 (11<sup>th</sup> Cir. 1986). Courts generally apply a totality of the circumstances test regarding whether or not a Chapter 13 case has

been filed in bad faith. *See, e.g., In re Kitchens*, 702 F.2d 885 (11<sup>th</sup> Cir. 1983); *In re LeMaire*, 898 F.2d 1346, 1350 (8<sup>th</sup> Cir. 1990) (*en banc*).

In this case, the Debtor filed his petition and schedules just hours before the \$212,030.60 arbitration award in favor of the Creditor, obtained in the Circuit Court of Miami-Dade County, Florida, Case No. 03-17080 CA(25), became final for execution purposes. The Debtor proposes to pay the Creditor over a 5 year period through a Chapter 13 plan, by paying the Creditor the sum of \$85,000.00 - which is currently being held in escrow for the benefit of the Creditor.

Moreover, the timing of the filing of the amended schedules is suspicious and leads this Court to believe that the omissions in the originally filed schedules were indeed wilful. Although the Debtor was forthcoming in his testimony, the Court finds the omissions in the Debtor's schedules were material; and, coupled with the timing of the amendments, were wilful. The Debtor failed to disclose material assets and liabilities on his originally filed schedules. The amendments to the schedules were filed only after the Debtor's 2004 examination and seemingly in response to the filing of the motions to dismiss by the Creditor and the Trustee - and then, only within one week prior to the hearing herein. The filing of an amendment in an attempt to disclose the omissions does not cure the failure to disclose in the originally filed schedules and statement of financial affairs for purposes of a Court determining whether to dismiss a Chapter 13 proceeding for cause. *See, In re Green*, 141 B.R. 440, 443 (Bankr. M.D. Fla. 1992) citing *In re Muscatell*, 113 B.R. 72, 74 (Bankr. M.D. Fla. 1990).

The Court rejects the Debtor's argument that the omissions were the result of ignorance. The Debtor possesses an advanced degree in Business Administration and should understand the importance of disclosure and the significance of declaring complete accuracy of disclosure when done so under penalty of perjury. The Debtor was represented by counsel at the time of the

preparation of the schedules and statement of financial affairs and could have inquired of counsel if he had any questions regarding completion of the forms.

Based upon the foregoing, it is

ORDERED AND ADJUDGED that the motions to dismiss, filed by Creditor Roger Silverio and the Chapter 13 Trustee, are GRANTED and this case is DISMISSED with prejudice for one (1) year from the date of this order. All parties shall bear their own fees and costs.

DONE AND ORDERED in Chambers at Miami, Florida, this 19th day of April, 2005.

**A. JAY CRISTOL, JUDGE  
UNITED STATES BANKRUPTCY COURT**

Copies furnished to:

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Wanda Murray-Reyes, Esq.